United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1743

ORIGINAL

To be argued by
LOUIS STRASSBERG

In The

United States Court of Appeals

For The Second Circuit

MJB SALES ASSOCIATES,

Plaintiff-Appellee,

vs.

DANA HALL OF CALIFORNIA, INC.,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF OF PLAINTIFF-APPELLEE MJB SALES ASSOCIATES

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MJB SALES ASSOCIATES,

Plaintiff-Appellee,

-against-

DANA HALL OF CALIFORNIA, INC.,

Defendant-Appellant.

----------x

Docket No.:
74/1743

BRIEF FOR PLAINTIFF-APPELLEE MJB SALES ASSOCIATES

Statement of Issues Presented for Review

1. Could the jury infer that the defendant's witness, MR. MICHAEL SAVITSKY, testified falsely concerning books and records where documents in evidence contradicted his direct testimony?

2. Was the jury's verdict, based upon the reasonable inferences to be drawn from the testimony and documents submitted into evidence, a fair one under the circumstances?

STATEMENT OF THE CASE

INTRODUCTORY STATEMENT

DANA HALL OF CALIFORNIA, INC., (hereinafter referred to as "DANA HALL"), appeals from a judgment of the United States District Court, for the Southern District of New York, from a jury verdict of $23,732.21 (plus interest from June 1, 1972), awarded to M.J.B. SALES ASSOCIATES (hereinafter referred to as "M.J.B."). The verdict was rendered by the jury after a trial before the HONORABLE WILLIAM C. CONNOR. The verdict represents commissions found by the jury to be due M.J.B.

PREFATORY STATEMENT

M.J.B. is a sales representative for apparel manufacturers. Its principals were ROBERT ORENSTEIN, MELVIN KLEEMAN and GERALD KATZ.

DANA HALL is a California-based manufacturer of women's wearing apparel using trade names of "DANA HALL" and MIKEY, JR." as its clothing lines.

In April 1971, DANA HALL employed M.J.B. as its sales representative in New York and agreed to pay M.J.B. commissions based on the orders solicited by

it and shipped from defendant's factory in Los Angeles. M.J.B. was to be paid commissions on actual shipments by defendant of orders solicited by it. The commission rate was seven (7%) percent of the sales price on orders solicited in those areas where M.J.B. was the specified sales representative; and three and one-half (3½%) percent of the sales price on orders solicited in areas outside the plaintiff's designated territory. In computing commissions, an eight (8%) percent trade discount on all returns of goods previously credited were to be deducted from all gross shipments. This commission arrangement continued until May 1, 1972.

Plaintiff contended it was entitled to commissions on orders solicited prior to May 1, 1972, and shipped in May, June and July of 1972.

MAY COMMISSION STATEMENT #1

Upon termination of the arrangement between DANA HALL and M.J.B., a final statement was issued reflecting commissions of $3,063.00 (Plaintiff's Exhibit 10). Three (3) checks for $1,000.00 each were issued to MESSRS. KLEEMAN, ORENSTEIN and KATZ respectively. The checks sent to KLEEMAN and ORENSTEIN had not been deposited and were returned

during trial. The check payable to KATZ had been deposited.

MAY COMMISSION STATEMENT #2 (Revised)

On the very day of trial, the defendant produced new records and a commission statement which reflected orders shipped for May, 1972 to be not $70,000.00 but $200,000.00. As a result of the purported discovery, the production of a new commission statement for May, 1972, the Court directed a partial verdict for the plaintiff of $8,387.00, representing commissions earned on shipments made from May 1st to May 25th, 1972 and $528.00 which was a conceded credit due plaintiff on returns of sample dresses (A 204).

The testimony elicited at trial as in most litigated matters was sharply disputed. The substantial conflicts in testimony required careful jury deliberation and it may not be said that their decision was injudicious.

MICHAEL SAVITSKY, President of DANA HALL, testified that four (4) days prior to trial, he received a subpoena requesting invoices; that he was given manilla folders which he examined and failing

to note their import, discarded them in a waste basket. During the night, it bothered him to the extent that he could not sleep, and returning to his office, the following morning, he miraculously located the young man who emptied the waste basket. With the young man at his side, MR. SAVITSKY located the trash barrel into which the contents of the waste basket had been emptied and after tipping over the trash, rummaging through its contents, the scrap of paper (Exhibit 11) was located. Realizing its importance, the statement was taken to New York and presented on the morning of trial. The manner in which this statement was located, it is respectfully submitted, might be met with doubt amongst skeptics albeit the testimony was elicited by the defendant's own witness on direct testimony.

TESTIMONY OF JACQUELINE WILSON RE: COMMISSION STATEMENT #1 AND #2

Over the course of her employment with DANA HALL, JACQUELINE WILSON was its bookkeeper, office manager and controller. She was thoroughly familiar with the relationship between M.J.B. and DANA HALL.

MISS WILSON testified that the original May

commission statement issued to M.J.B. was not a true or accurate reflection of goods shipped in May 1972 on orders obtained by M.J.B. (A 62-63).

In addition, the witness directly disputed the manner in which the revised May statement was located. Specifically, MISS WILSON testified seeing the document (Plaintiff's Exhibit 11) in December 1972, at the same time Exhibit 10 had been prepared (A 63-64).

Further, the witness testified that on specific instructions from MICHAEL SAVITSKY, MISS WILSON was directed that M.J.B. was not to receive commissions; that a statement was prepared to show commission of $3,000.00 and checks issued to MESSRS. KLEEMAN, ORENSTEIN and KATZ.

JUNE-JULY COMMISSIONS

The testimony of MISS WILSON was to the effect that she was specifically instructed on May 26, 1972, that M.J.B.'s name would not appear on orders shipped and all orders were to be shown as "New York" in place and stead of M.J.B. Further, this witness testified to shipments made in June on orders which eminated from M.J.B. (A 72), and testi-

fied that there were commissions due as follows:

a) $200,000.00 - $225,000.00 at seven (7%) percent commission

b) $60,000.00 - $70,000.00 at three and one-half (3½%) percent commission (A 73)

For July commission, the witness stated commissions were due M.J.B. as follows:

a) $50,000.00 - $60,000.00 at seven (7%) percent commission

b) $10,000.00 - $15,000.00 at three and one-half (3½%) percent commission (A 73-74)

* * *

The witness JACQUELINE WILSON, attested to a pattern of deception practiced by MICHAEL SAVITSKY in his relations with M.J.B. Although commissions were due M.J.B. solely on shipments made, the reduction of "bookings" would also relate to amounts ultimately shipped. The testimony by MISS WILSON was as follows (A 86):

"Q The April bookings that are on there indicate $231,169, is that correct?

A That's what's indicated.

Q Is that the correct figure?

A No.

Q What was the correct figure, do you recall?

A $321,169.

Q The 321 was changed to 231, is that your testimony?

A Yes, sir.

Q And is the figure for March correct?

A No.

Q Is the figure for February correct?

A No.

Q And is the figure for January correct?

A I don't believe so.

Q Can you tell us by approximately how much the March figure of bookings was reduced?

A I believe the March figure was reduced by approximately sixty to seventy thousand dollars.

Q And the February figure, by how many that was reduced?

A Between forty and fifty thousand.

Q And the January figure?

A Between twenty and thirty thousand dollars."

On direct testimony, the witness testified to changing April bookings from $321,169.00 to $231,169.00, and the witness related she was instructed to "get down more" and further to "get down $89,000".

The witness MICHAEL SAVITSKY on cross-examina-

tion denied ever saying such and emphatically stated he did not speak in that fashion (A 130).

A document, Plaintiff's Exhibit 19, was admitted into evidence and MR. SAVITSKY conceded the writing using exactly those terms were in his handwriting (A 131).

In an effort to minimize the damaging effect of MISS WILSON testifying on behalf of the plaintiff, the defendant-appellant sought to portray this employee as being incompetent. MICHAEL SAVITSKY, as President, stated in direct testimony that he was unsatisfied with her performance as an employee.

But on cross-examination, the purported dissatisfaction with MISS WILSON as an employee was demonstrated in odd fashion. A month subsequent to her "alleged" unsatisfactory work, the witness was issued a $1,200.00 Christmas bonus and a $25.00 per week salary increase. This was in addition to a $17,500.00 salary.

Certainly the dissatisfaction with an employee in November, 1972 would not manifest itself by a bonus of a substantial amount the following month plus an equally generous increase in salary. It

is incongruous to assume that a disgruntled employer would lavish such benefits on an employee whose performance was not exceptional.

"FALL SAMPLE" GARMENTS

Crucial to the earning of commissions for June-July, 1972, was an issue as to whether or not the fall line was made available to the plaintiff. All parties conceded that during April, 1972, salesmen were selling "fall goods".

Plaintiff's witness, MR. ORENSTEIN, testified to receiving fall samples in April, 1972.

MICHAEL SAVITSKY, on behalf of DANA HALL, in response to direct testimony stated (A 113):

"Q When did the samples for the fall line of 1972 go out to M.J.B.?

A The fall line didn't go out to M.J.B. The fall line was sent, I believe this to be a fact, the fall lines were sent to 1400 Broadway, and were picked up by these two gentlemen as salesmen.

They didn't have the fall line as M.J.B."

On cross-examination, however, MICHAEL SAVITSKY conceded samples of the fall line were sent to M.J.B. throughout April, 1972 (A129).

"Q Sir, were samples sent to M.J.B., in the month of April, 1972? Yes or no.

A No.

Q Now sir, I show you this invoice dated April 13, 1972, which was furnished me by your attorney as being one of the records of samples sent to M.J.B.

MR. TESSLER: I object, your Honor. If Mr. Strassberg would like to testify, let him take the stand, but if he wants to know what a document is, let him ask the witness.

MR. STRASSBERG: Let's phrase it differently.

Q Is that a photostat copy of a sample charged to M.J.B.?

A Yes.

Q And does it say M.J.B. on it on April 13, 1972?

A Yes.

Q Does this one say M.J.B. on it on April 13th?

A Yes.

Q And on April 17th, does this one say M.J.B.?

A Yes.

Q And on April 20th, does this one say M.J.B.?

A Yes."

On cross-examination, the defendant's witness, MICHAEL SAVITSKY, stated there were no sales for M.J.B. during June 1972. However, an examination of his testimony showed this was not the fact (A 306-314). There were invoices in which M.J.B.'s name appeared and for which no commissions were sent to the plaintiff. The defendant's pretext for his

failure to pay commissions.

"It could be an error." (A 311)

"That's definitely got to be a mistake." (A 312)

INVOICES INTRODUCED INTO EVIDENCE

Plaintiff introduced into evidence invoices for the final six (6) days of May, June and July, 1972. In admitting the items into evidence, the Court, over objection by defendant's counsel, stated:

"THE COURT: We have two problems with that. Problem number one is the fact that according to Mr. Strassberg he asked for these records much earlier, he was told they didn't exist, and on the eve of trial practically, three very large cardboard containers or files are in effect dumped on him and he is in effect told to find the needle in the haystack in time to get it in evidence before closing his case a day later, while being in court all the time in the meantime. (Emphasis Supplied)

MR. TESSLER: Your Honor, as an officer of the Court --

THE COURT: Excuse me, let me finish.

MR. TESSLER: I am terribly sorry.

THE COURT: Point number two is the fact that he is convinced that looking at the records wouldn't do any good because the names that appear on the invoices have been changed. M.J.B. has been replaced by New York, and there is no way of determining which shipments were made in response to orders booked by M.J.B. Of course, those records are equally available to the defendant, as a matter of

fact even more so because the defendant has had them not just for the time of this trial but has had them ever since they were originally made two years ago."

* * *

It is respectfully submitted that the case before the jury presented a sharp divergence of testimony:

1. The "purported" discovery of a new May commission statement, on the Thursday prior to trial, when MISS WILSON testified to the records being in defendant's possession for almost eighteen (18) months.

2. Testimony that invoices on orders to be shipped were to be altered "New York" as the agent instead of M.J.B. irrespective of when ordered.

3. Testimony that plaintiff's salesmen were in possession of the "fall line" during April, 1972; disputed by MR. SAVITSKY; and on cross-examination a concession that samples of the "fall line" were sent throughout April 1972 and as late as April 28, 1972 (A 138).

4. Defendant's witness contending dissatisfaction with an employee (MISS WILSON) in November 1972; and upon cross-examination conceding a bonus and raise on top of a substantial salary the wit-

ness was receiving.

5. Testimony by the witness that she altered figures at MR. SAVITSKY's direction.

6. A "writing" by MR. SAVITSKY in which he used terms "get down more" and "get down $89,000" after emphatically denying the same under oath.

7. Testimony that credits claimed by DANA HALL were never sent to the plaintiff.

8. The invoices received into evidence in the possession of the defendant for almost two (2) years; not made available to the plaintiff during pre-trial discovery; and an affidavit filed that the invoices did not exist.

9. Invoices on goods shipped in June and July bearing the name M.J.B. upon which no commissions had ever been issued.

There was sufficient testimony and documentary evidence to demonstrate plaintiff's entitlement to commissions and that the defendant's principal witness MR. MICHAEL SAVITSKY testified falsely.

The jury was entitled on the basis of the evidence to reach the conclusion it did, and the verdict was fair and reasonable.

ARGUMENT

POINT I

THE COURT BELOW PROPERLY SUBMITTED EVIDENCE TO THE JURY

The admissibility of evidence in a federal court is a procedural matter to be governed by the application of Rule 43(a) Federal Rules of Civil Procedure. In its pertinent part, the statute reads:

> "All evidence shall be admitted which is admissible (Under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or) under the rules of evidence applied to the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made..."

Rule 43(a) affirmatively expands the scope of admissibility favoring the reception of evidence. *New York Insurance Co. v. Schlatter et al, 203 F2d 184,188, 5 Civ. 1953.* Although the rule specifies three (3) categories of evidence that shall be admitted, it does not prohibit the receipt of probative evidence outside the three (3) categories. In *Monarch Insurance Company of Ohio v. Spach, 281 F2d 401 (5th Cir. 1960),* the court said:

"(the rule) defines three (3) standards of

> admissibility. But it does not purport to prohibit the admission of other relevant material probative evidence which, in the considered exercise of judicial wisdom, is trustworthy."

Moreover, doubts "must be resolved in favor of admissibility". *Erie R. Co. v. Lade, 209 F2d 948, 951 (6 Cir. 1954)*, and "The cast is toward admissibility, not exclusion". *Kirkendoll v. Neustrom, 379 F2d 694, 697 (10 Cir. 1967).*

Evidence in Federal Courts is designed to permit admission of all that which is relevant and material to the issues in controversy. *U.S. v. 1,129.75 Acres of Land, more or less, in Cross and Poinsett Counties, 473 F2d 996 (C.A. Ark. 1973).*

Federal Practice favoring an admission of evidence rather than the exclusion, if the proffered evidence has any probative value at all. *Butler v. Southern Pacific Co., 431 F2d 77 (C.A.L.A. 1970).*

An offer of proof cannot be denied as remote or speculative because it does not cover every fact necessary to prove the issue but it is enough if it is an appropriate link in the chain of proof. *McCandless v. U.S., 298 U.S. 342, 56 S. Ct. 754, 80 L. Ed. 1205.*

The Courts have been liberal in permitting the admission of evidence if there is any theory justi-

fying its admission and have given the Trial Judge broad discretion. See *Household Goods Carriers' Bureau v. Terrell, 452 F2d 152 (5th Cir. 1971).*

The determination of relevancy or proof offered at trial is a matter resting largely within the sound discretion of the Trial Court and is not ordinarily reversible upon appeal. *Trans-Car Purchasing Inc. v. Summit Fidelity & Sur. Co., 454 F2d 788 (C.A. Ill. 1971).*

It is not error for the Trial Court to submit a cause to the jury upon relevant evidence, the weight of which is for the jury. *Van Stone v. Stillwell & B. Manufacturing Company, 142 U.S. 128, 12 S. Ct. 181 (1891).*

Where the evidence offered has sufficient weight to be pertinent, it should be submitted to the jury. The standard of proof required for the submission of evidence is essentially one to be worked out in particular situations and the essential requirement being that in passing upon the question whether there is sufficient evidence to submit an issue to the jury, the court looks only to the evidence and reasonable inferences which tend to support the case of a litigant. *Wilkerson v. McCarthy, 336 U.S. 53 (1949).*

There was in the case at bar substantial testimony by plaintiff concerning a deprivation of commissions earned by it. The concealment of invoices for two (2) years augmented by a revision of May 1972 commissions on the day of trial, and testimony concerning a direction to alter the invoices to reflect a name other than that of the plaintiff was sufficient to permit those invoices to be introduced into evidence.

POINT II

THE FUNCTION OF THE JURY IS TO RESOLVE CONFLICTING INFERENCES AND CONCLUSIONS, AND ITS VERDICT SHOULD NOT BE SET ASIDE

The weighing of evidence, the credibility of witnesses and the assessing of their strengths and weaknesses are the function of the jury. *Commercial Union Assur. Co. v. Berry, 359 F2d 510 (C.A. Mo. 1966); Atlantic & Pacific Stores, Inc. v. Pitts, 283 F2d 756 (C.A.S.C. 1960); Illinois Cent. R. Co. v. Stufflebean, 270 F2d 801 (C.A. Iowa 1959).*

Their basic function being to select from among conflicting inferences and conclusions that which it considers most reasonable. *Lebrecht v. Bethlehem Steel, 402 F2d 585 (C.A.N.Y. 1968).*

It is the province of the jury to resolve conflicting inferences from circumstantial evidence within the range of reasonable probability. *Twin City Plaza v. Central Surety & Insurance Group, 409 F2d 1195 (C.A. Neb. 1969).*

The resolution of conflicting evidence is a function for the jury arising from contradictory testimony, *Meadows & Walker Drilling Co. v. Phillips Petroleum Co., 417 F2d 378 (C.A. Tex. 1969);*

O'Neill v. Reading Co., 306 F2d 204 (C.A. Pa. 1962); Mills v. Mealey, 274 F. Supp. 4 (D.C. Va. 1967), and to draw reasonable inferences from the evidence. *Shelton v. Jones, 272 F. Supp. 139 (D.C. Va. 1967).*

Admissions made directly by a party are admissible in evidence against such party in a Federal District Court where they were inconsistent with a claim he asserted in the action. *Purer & Co. v. Aktie Bolaget Addo, 410 F2d 871 (C.A. Cal. 1969).*

The Court on appeal may reweigh the evidence but it should not exercise discretion unless the verdict shocks the conscience of the Court. *Sheats v. Bowen, 318 F. Supp. 640 (D.C. Del. 1970);* and in reviewing a jury verdict, the Appellate Court must view the evidence most favorable to a party prevailing in the Trial Court. *Kesmarki v. Kisling, 400 F2d 97 (C.A. Ohio 1968).*

The jury's determination should not be disturbed if there is competent evidence in the record to support it. *Torrence v. Union Barge Line Corp., 408 F2d 873 (C.A. La. 1969).*

The jury as judicial finder of facts, and not the Court, weighs conflicting evidence and the inferences in determining the credibility of witnesses.

Liberty Mutual Insurance Co. v. Davis, 412 F2d 475 (D.A. Fla. 1969).

Neither the Trial Court nor the Court of Appeals may substitute its judgment for that of the jury on disputed issues of fact. *Continental Airlines, Inc. v. Wagner Morehouse Inc., 401 F2d 23 (C.A. Ill. 1968).*

It is the duty of the Appeals Court to take that evidence on appeal in a light most favorable to the party prevailing below and which tends to support the jury verdict and to accept as established all reasonable inferences arising from the testimony which sustained the verdict. *Oliver v. Hallett Const. Co., 421 F2d 365 (C.A. Ark. 1970); Crews v. Clonce, 432 F2d 1259 (C.A. Ind. 1970); American Universal Ins. Co. v. Dykhouse, 326 F2d 694 (C.A. Iowa 1964).*

It is for the jury to resolve debatable questions of fact on which fair-minded men would differ. *Stone v. N.Y.C. & St. L. R. Co., 344 U.S. 407, 73 S. Ct. 358,* and where uncertainty arises from a conflict of testimony or because the facts being undisputed, fair-minded men may honestly draw different conclusions from them, the question is not one

of law but of fact to be settled by the jury. *Best v. District of Columbia, 291 U.S. 411, 54 S. Ct. 487.* The jury resolves issues of fact upon which fair-minded jurors might honestly differ. *Maynard v. Durham & Southern R. Co., 365 U.S. 160, 81 S. Ct. 561.*

The jury in the within action had presented to it a divergence of testimony. The weighing of evidence and the credibility of witnesses is a function peculiarly that of the jury, and its determination should not be disturbed. *Torrence v. Union Barge Line Corp., supra.*

On the question of burden of proof, it is the jury and not the Court of Appeals on review which passes on the credibility of witnesses. *Tillman v. Great Am. Indem. Co. Of N.Y., 207 F2d 588 (C.A. Wis. 1953).*

The weight given to the testimony of witnesses is often difficult and is a question of fact for the jury whose determination is conclusive on appeal in absence of abuse of discretion or clear error of law. *Evans v. U.S., 326 F2d 827 (C.A. Neb. 1964).*

Appellate Courts should be slow to impute to

juries a disregard of their duties. *Fairmount Glass Co. v. Cub Fork Coal Co.*, 287 U.S. 474, 53 S. Ct. 252.

CONCLUSION

The judgment of the District Court should be in all respects affirmed.

Dated: New York, New York
October 16, 1974

Respectfully Submitted,

STRASSBERG & STRASSBERG
Attorneys for Plaintiff-Appellee

LOUIS STRASSBERG
Of Counsel

US COURT OF APPEALS: SECOND DIRCUIT

Index No.

MJB SALES ASS.,
Plaintiff-Appellee,

against

DANA HALL OF CAL., INC.,
Defendant-Appellant.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortegá, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 29th day of October 1974 at 17 E. 63rd Street, New York

deponent served the annexed Brief upon

Amen Weisman

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 29th day of October 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0413950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975